

# Property Rights and the Protection of Subsistence in Article 1(2) of the Human Rights Covenants

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## Abstract

This article examines how property rights have informed the peoples' right to resources in Article 1(2) of the Human Rights Covenants. It examines practice in the interpretation of Article 1, as well as jurisprudence from the Inter-American and African human rights systems linking peoples' rights and the right to property. It also highlights the pivotal role of protection of subsistence in making this connection. The right to resources can draw from different forms of property, including private, public, communal and traditional forms. Property rights under Article 1 have also applied to a range of communities, including indigenous peoples, subsistence farmers, traditional property owners, ethnic minorities, as well as the general population of a state. The common feature of these communities is their vulnerability in the protection of their means of subsistence, and this has linked property rights with Article 1.

## Keywords

Right to property; right to dispose of resources; subsistence; Human Rights Covenants; Article 1; indigenous peoples

## 1. Introduction

This article looks the expanding role of property rights in the interpretation of peoples' rights in Article 1 of the Human Rights Covenants 1966 and the pivotal role that the protection of a people's means of subsistence can play in this. While there is no specific human right to property in either Covenant – the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) – property rights have been used extensively in the application of Article 1. This is most relevant for the peoples' right to dispose of their resources and not to be deprived of their means of subsistence in Article 1(2).<sup>1</sup> This right, though, also forms part of the more general right of self-determination<sup>2</sup> in Article 1(1) by which peoples may freely pursue their economic, social and cultural development.<sup>3</sup> Much of this focus on property has been on the land rights of indigenous peoples, but property rights are relevant for the subsistence of different sections of a population, including subsistence farmers, minorities and women.

The Covenants are unusual among human rights treaties in that neither proclaims the right to property, unlike regional instruments or the Universal Declaration of Human Rights (UDHR) 1948. Article 1 cannot fill this gap. Its focus is fundamentally collective. The denial of an individual's right to property does not in itself translate into the deprivation of a people's right to resources, a position affirmed by the Human Rights Committee (HRC) in *Hom v. Philippines*

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<sup>1</sup> Common Article 1(2): "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." International Covenant on Civil and Political Rights 1966, 999 UNTS p. 171 (adopted 19 December 1966, entry into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS p. 3 (adopted 19 December 1966, entry into force 3 January 1976).

<sup>2</sup> See A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995) pp. 55-56; A. A. Yusuf, 'The Role that Equal Rights and Self-Determination of Peoples can Play in the Current World Community', in A. Cassese (ed.), *Realizing Utopia* (Oxford University Press, 2012) p. 388.

<sup>3</sup> Common Article 1(1): "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *supra* note 1

in 2003.<sup>4</sup> Nevertheless, peoples are groups composed of individuals with a relationship to that group, even if this is open to different interpretations. A peoples' right to resources could be constructed from concepts of property within a group, whether by collectivising individual property rights, recognising traditional communal use or empowering state regulation and ownership of property.

The peoples' right to resources has often been treated as synonymous with state regulation of property as part of a right to permanent sovereignty. On this interpretation, peoples' rights could restrict the human right to property. However, the reality is arguably more fluid. The right to resources in Article 1(2) certainly takes a collective perspective, but it also addresses private, public, communal and traditional forms of property from this position. A crucial nexus in linking these rights is the protection of a peoples' means of subsistence. Subsistence provides an essential link between property rights, other human rights and peoples' rights. This connection to subsistence has been most obvious and developed for indigenous peoples, but it is not specifically limited to them, as similar vulnerabilities can be shared by other parts of a state's population.

The development of a peoples' right to resources in Article 1(2) has been undoubtedly been hampered by ambiguity over the concept of 'peoples'. The HRC has considered the rights in Article 1, uniquely among rights in the ICCPR, not to be available for individual communication under the ICCPR Optional Protocol I.<sup>5</sup> This marginalisation has led to the peoples' right to resources being dubbed a "forgotten right".<sup>6</sup> Nonetheless, practice by the Committee on Economic, Social and Cultural Rights (CESCR) has shown greater engagement with Article 1. This has been both in its observations on states' reports and its apparent openness

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<sup>4</sup> *Hom v. Philippines* (2003) Communication No. 1169/2003, 30 July 2003, HRC, View, para. 4.2, <http://juris.ohchr.org/Search/Details/1075>, visited 24 September 2018.

<sup>5</sup> See, e.g., *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (1990) Communication No. 167/1984, 26 March 1990, HRC, View, para. 32.1, <http://juris.ohchr.org/Search/Details/665>, visited 24 September 2018.

<sup>6</sup> J. Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?' 21 NQHR (2013) pp. 314-341.

to communications under the ICESCR Optional Protocol if confined to economic, social and cultural aspects of self-determination.<sup>7</sup> As a large proportion of communications to the HRC attempted under Article 1 have involved land and resources, it is likely that the CESCR will need to engage with property rights if it accepts communications under the article.

This article will address the potential content of a peoples' right to resources and its relationship with property rights and subsistence. It will first outline the basic content of a human right to property and its relationship with other rights. Second, it will look at how private, communal and public property can inform peoples' rights and their significance for Article 1(2). Third, it will examine how peoples' rights, protection of subsistence and the right to property have interacted in the Inter-American and African human rights systems. Lastly, it will look at the influence of property rights on the peoples' right to resources in Article 1, focussing on indigenous peoples, the general population, subsistence farmers and traditional land owners, and minorities. This examination draws on states' reporting on their obligations under Article 1<sup>8</sup> and observations by the CESCR and HRC<sup>9</sup> as indicators of subsequent practice in the interpretation of this article. It is argued that a peoples' right to resources paired with protection of subsistence addresses different vulnerable sections of a state's population through protection of property rights.

## **2. The Human Right to Property in International Law**

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<sup>7</sup> See Comments by Mr. Simma, Ceausu and Alston (Chair), UN Doc. E/C.12/1996/SR.46/Add.1, paras. 43-47.

<sup>8</sup> Relevant for the interpretation of Article 1 under Article 31(3)(b) Vienna Convention on the Law of Treaties 1969. See G. Nolte, Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, UN Doc. A/CN.4/671, pp. 21-24, paras. 44-48.

<sup>9</sup> The relevance of committee practice was recognised in *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo)* 30 November 2010, ICJ, Judgment, para. 66, <<https://www.icj-cij.org/en/case/103/judgments>>, visited 24 September 2018.

The human right to property is widely established in different instruments. At treaty level, it is proclaimed in several regional human rights systems: in Europe in Article 1 of Protocol I to the European Convention on Human Rights 1950;<sup>10</sup> in the Americas in Article 21 of the American Convention on Human Rights 1969;<sup>11</sup> and in Africa in Article 14 of the African Charter on Human and Peoples Rights 1981.<sup>12</sup> These systems have complaints procedures which have allowed this right to develop in jurisprudence. The right is also recognised in the Arab Charter on Human Rights 2004,<sup>13</sup> which is limited to reporting obligations, and the non-binding ASEAN Human Rights Declaration 2012.<sup>14</sup> Alongside these regional human rights systems, the right to property and the prevention of its arbitrary deprivation is proclaimed in Article 17 of the formally non-binding UDHR.<sup>15</sup>

The formulation of the right to property varies between those instruments, which in part reflects different historical, economic and social contexts.<sup>16</sup> Indigenous property claims, which have been important in linking the human right to property and peoples' rights have been much more significant in the Americas, and to a degree Africa, than in Europe. Correspondingly, this article focusses more on the Inter-American and African systems than the European. Nonetheless, three common elements can be identified.

First, the concept of 'property' in the instruments has been interpreted broadly to encompass not just physical property, but also economic interests and rights.<sup>17</sup> Second, while the human

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<sup>10</sup> Article 1, Protocol I to the European Convention on Human Rights 1952 (adopted 20 March 1952, entered into force 18 May 1954).

<sup>11</sup> Article 21, American Convention on Human Rights 1960 (adopted 22 November 1969, entered into force 18 July 1978).

<sup>12</sup> Article 14, African Charter on Human and Peoples' Rights 1981 (adopted 1 June 1981, entered into force 21 October 1986).

<sup>13</sup> Article 31, Arab Charter on Human Rights 2004 (adopted 23 May 2004, entered into force 15 March 2008).

<sup>14</sup> Principle 17, ASEAN Human Rights Declaration 2012 (adopted 18 November 2012).

<sup>15</sup> Article 17, Universal Declaration of Human Rights 1948, annexed to General Assembly Resolution 217 (III), 10 December 1948, UN Doc. A/RES/217(III)A.

<sup>16</sup> J. E. Alvarez, *The Human Right of Property* (New York University School of Law Public Law and Legal Theory Research Paper Series, Working Paper No. 18-21, March 2018) pp. 60-61.

<sup>17</sup> *Abrill Alosilla et al. v. Peru*, 4 March 2011, IACtHR, Judgment, para. 82, <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_223\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_223_ing.pdf)>, visited 22 September 2018; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya* ('Endorois'), Communication No. 276/2003, 25 November 2009, ACHPR, paras. 186-189,

right to property often has an individual focus, it has supported collective interpretations in particular contexts. Third, the right is a relative one, subject to restrictions in the public interest. The least developed framework for these restrictions is found in Article 17(2) of the UDHR, which simply provides that: “No one shall be arbitrarily deprived of his property.” The Inter-American, African and European instruments contain more specific limitations. All three require restrictions to be prescribed by law<sup>18</sup> and have a public purpose.<sup>19</sup> Jurisprudence from these systems also shows that the limits must be proportionate to their aims<sup>20</sup> and include compensation, with ‘adequate’ providing a common standard.<sup>21</sup> (Article 21(2) of the American Convention provides for “just” compensation, which has been interpreted as ‘prompt, adequate and effective’).<sup>22</sup> The notion of ‘adequate’ itself leaves bodies discretion on the amount and form of compensation.<sup>23</sup> For example, the Inter-American Court in *Salvador Chiriboga v. Ecuador* considered that it included “the trade value of the property ... and, the fair balance between the general interest and the individual interest.”<sup>24</sup> This starts from the market value but allows the context to affect the valuation.

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<[http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf)>, visited 22 September 2018; *Bramelid and Malmström v. Sweden*, Applications Nos. 8588/79 and 8589/79, 12 October 1982, ECHR, p. 81, <<file://lanes/homes/04/summersj/Downloads/BRAMELID%20v.%20SWEDEN.pdf>>, visited 22 September 2018.

<sup>18</sup> *Beyeler v. Italy*, Application No. 33202/96, 5 January 2000, ECtHR, Judgment, para. 109, <[https://hudoc.echr.coe.int/eng#{%22appno%22:\[%2233202/96%22\],%22itemid%22:\[%22001-58832%22\]}](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2233202/96%22],%22itemid%22:[%22001-58832%22]}>)>, visited 22 September 2018; *Salvador Chiriboga v. Ecuador*, 6 May 2008, ACtHR, Judgment, para. 63, <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_179\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_179_ing.pdf)>, visited 22 September 2018; *Endorois*, *supra* note 17, para. 219.

<sup>19</sup> *Beyeler v. Italy*, *supra* note 18, para. 111; *Chiriboga v. Ecuador*, *supra* note 18, para. 63; *Endorois*, *supra* note 17, paras. 212-213.

<sup>20</sup> *Pressos Compania Naviera S.A. and Others v. Belgium*, Application No. 17849/91, 20 November 1995, ECtHR, Judgment, para. 38, <[https://hudoc.echr.coe.int/eng#{%22appno%22:\[%2217849/91%22\],%22itemid%22:\[%22001-58168%22\]}](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2217849/91%22],%22itemid%22:[%22001-58168%22]}>)>, visited 22 September 2018; *Chiriboga v. Ecuador*, *supra* note 18, para. 63; *Endorois*, *supra* note 17, para. 214.

<sup>21</sup> *Holy Monasteries v. Greece*, Application No. 13092/87; 13984/88, 9 December 1994, ECtHR Judgment, para. 71, <[https://hudoc.echr.coe.int/eng#{%22appno%22:\[%2213984/88%22\],%22itemid%22:\[%22001-57906%22\]}](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2213984/88%22],%22itemid%22:[%22001-57906%22]}>)>, visited 22 September 2018; *Dino Noca v. D. R. Congo*, Communication No. 286/2004, 22 October 2012, ACHPR, para. 143, <[http://www.achpr.org/files/sessions/52nd/comunications/286.04/achpr52\\_286\\_04\\_eng.pdf](http://www.achpr.org/files/sessions/52nd/comunications/286.04/achpr52_286_04_eng.pdf)>, visited 22 September 2018.

<sup>22</sup> *Chiriboga v. Ecuador*, *supra* note 18, para. 96.

<sup>23</sup> Alvarez, *supra* note 16, pp. 38, 76.

<sup>24</sup> *Chiriboga v. Ecuador*, *supra* note 18, para. 98. See also *James v. UK*, Application No. 8793/79, 21 February 1986, ECtHR, Judgment, para. 54,

The right to property can also be found in the national laws of almost every state. A 2014 study by John Sprankling found that: “95% of the 193 states which are members of the United Nations guarantee the right to property, most commonly by language embedded in the national constitution.”<sup>25</sup> In addition, most of these provisions not only recognised an abstract right but also addressed its content and conditions for its restriction.<sup>26</sup> Nonetheless, the specific formulation of those rights still varied between states and the prevention of arbitrary deprivation of property in Article 17 of the UDHR was seen as a common denominator.<sup>27</sup> The concept of ‘arbitrary’ deprivation in the UDHR is not defined and provides a minimum standard due to the failure to agree on more specific conditions. Nonetheless, it may include failure to provide compensation or a discriminatory intent.<sup>28</sup>

Widespread international and domestic recognition has supported claims that the right to property is part of custom.<sup>29</sup> A customary right has been seen to be developing from the 1990s, with greater acceptance of property rights following the collapse of communism.<sup>30</sup> Such a right received strong recognition from the EU Court of First Instance in *Kadi* in 2005, which found that the arbitrary deprivation of property violated *jus cogens*.<sup>31</sup> Nonetheless, differences in content between states and human rights systems over the conditions of inference may limit the scope of custom to arbitrary deprivation.<sup>32</sup>

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<[<sup>25</sup> J. G. Sprankling, ‘The Global Right to Property’, 52 CJTL \(2014\) p. 484.](https://hudoc.echr.coe.int/eng#{%22appno%22:[%228793/79%22],%22itemid%22:[%22001-57507%22]}>”, visited 22 September 2018</a></p>
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<sup>26</sup> *Ibid.*, p. 489.

<sup>27</sup> *Ibid.*, p. 488.

<sup>28</sup> C. Krause and G. Alfredsson, ‘Article 17’, in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights* (Martinus Nijhoff, The Hague, 1999) p. 364; Alvarez, *supra* note 16, p. 67.

<sup>29</sup> Sprankling, *supra* note 25, pp. 464-505.

<sup>30</sup> See L. Valencia Rodríguez, *The Right of Everyone to Own Property Alone as well as in Association with Others*, 23 November 1993, UN Doc. E/CN.4/1994/19, p. 22, para. 97.

<sup>31</sup> *Yassin Abdullah Kadi v. Council and Commission*, Case T-315/01, 21 September 2005, CJEU, Judgment, para. 242, <<http://curia.europa.eu/juris/showPdf.jsf?docid=65739&doclang=en>>, visited 22 September 2018.

<sup>32</sup> Alvarez, *supra* note 16, p. 97; Sprankling, *supra* note 25, p. 499.

There is also a broader connection with other human rights. While there is no right to property in the Covenants, the effects of a denial of such rights have been addressed by the CESCR.<sup>33</sup> A crucial benefit of the right to property is that it provides individuals with security of tenure. (Security of tenure is a broader concept than property ownership and can include the rights of tenants in rented accommodation or informal settlements).<sup>34</sup> It also allows access to land for agriculture and access to business property, enabling people to secure a livelihood. As such, it underpins rights to life,<sup>35</sup> food<sup>36</sup> and health,<sup>37</sup> which form basic elements of subsistence. Moreover, its impact goes further than mere physical survival.<sup>38</sup> General comments by the HRC on persons belonging to ethnic, religious and linguistic minorities<sup>39</sup> and the by CESCR on the right to culture<sup>40</sup> have both emphasised the significance of protecting land and resources in ensuring the way of life and cultural identity of indigenous communities.

### **3. The Right of Peoples to Dispose of their Resources in Article 1**

The relationship between the right to property and other human rights can inform the peoples' right to dispose of their resources. Peoples are ultimately groups of individuals. The rights of those individuals, in turn, could shape the rights that peoples exercise collectively. However, as there is no single definition of a 'people', the relationship between individuals, property rights and peoples' rights varies according to different theories.

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<sup>33</sup> CESCR General Comment No. 4, 1 January 1992, UN Doc. E/1992/23, para. 9; *I.D.G. v. Spain*, Communication No. 2/2014, 17 June 2015, CESCR, View, para. 11.1, <<http://juris.ohchr.org/Search/Details/2010>>, visited 22 September 2018.

<sup>34</sup> J. G. Sprankling, *The International Law of Property* (Oxford University Press, Oxford, 2014) p. 125.

<sup>35</sup> CESCR General Comment No. 7, 20 May 1997, UN Doc E/1998/22, Annex IV, para. 4.

<sup>36</sup> CESCR General Comment No. 12, 12 May 1999, E/C.12/1999/5, paras. 13 and 15.

<sup>37</sup> CESCR General Comment No. 14, 11 August 2000, E/C.12/2000/4, para. 43.

<sup>38</sup> On the physical and cultural value of land see J. Gilbert, *Indigenous Peoples' Land Rights under International Law* (Second Edition), (Brill, Leiden, 2016), pp. 178-209.

<sup>39</sup> HRC General Comment No. 23, 26 April 1994, UN Doc. CCPR/C/21/REV.1/Add.5, para. 7.

<sup>40</sup> CESCR General Comment No. 21, 21 December 2009, UN Doc. E/C.12/GC/21, para. 36.



There are three notable approaches to the relationship between individuals and peoples, each with different implications for the link between the right to property and peoples' rights. First, a people could be defined as the whole population of a state, with peoples' rights as a sum of the human rights enjoyed by that population. This reflects a classic liberal approach to a people, as a community united by shared rights.<sup>41</sup> This has been prominent historically in the American and French revolutions, where property rights underpinned self-government,<sup>42</sup> and can be seen in contemporary reports on Article 1 of the Covenants.<sup>43</sup> The direct extension of peoples' rights from human rights can also be seen in the practice of the African Commission on Human and Peoples' Rights.<sup>44</sup> In *COHRE v. Sudan* (2009), for example, the Commission identified a violation of the peoples' right to development based on "a massive violation of not only the economic, social and cultural rights, but other individual rights of the Darfurian people."<sup>45</sup> These rights included property. This approach aligns peoples' rights with the right to property and means that legitimate restrictions for a public purpose on the latter right also apply. Protection of subsistence in this context emphasises the scale of individual human rights violations to the point where they impact on peoples' rights.

Second, peoples' rights could relate to the property rights of a community. Communal property rights have been identified for indigenous peoples and other communities. One of the main theories to support these rights is communitarian liberalism,<sup>46</sup> which sees certain rights,

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<sup>41</sup> See J. Locke, *Two Treatises of Government*, P. Laslett (eds.), (Second Edition) (Cambridge University Press, Cambridge, 1967) bk. II, ch XI, s. 139, ch. XIII, s. 149 and ch. XIX, s. 222.

<sup>42</sup> See Article 1, Virginia Declaration of Rights 1776; Articles 3 and 17, Declaration on the Rights of Man and the Citizen 1789.

<sup>43</sup> See, e.g., Lebanon: "The economic system is free and guarantees private initiative, the right to private property and the balanced development of regions". Third Periodic Report 2016, UN Doc. CCPR/C/LBN/3, para. 8.

<sup>44</sup> *Kevin Mgwanga Gunme v. Cameroon*, Communication No. 266/2003, 27 May 2009, ACHPR, paras. 176 and 178, <[http://www.achpr.org/files/sessions/45th/comunications/266.03/achpr45\\_266\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/45th/comunications/266.03/achpr45_266_03_eng.pdf)>, visited 22 September 2018.

<sup>45</sup> *COHRE v. Sudan*, Communication Nos. 279/03 and 296/05, 27 May 2009, ACHPR, para. 224, <[http://www.achpr.org/files/sessions/45th/comunications/279.03-296.05/achpr45\\_279.03\\_296.05\\_eng.pdf](http://www.achpr.org/files/sessions/45th/comunications/279.03-296.05/achpr45_279.03_296.05_eng.pdf)>, visited 22 September 2018.

<sup>46</sup> Y. Tamir, *Liberal Nationalism* (Princeton University Press, Princeton, 1993) pp. 72-76; J. Raz and A. Margalit, 'National Self-Determination' in J. Raz (eds.), *Ethics in the Public Domain* (Clarendon Press, Oxford, 1994) pp. 110-130; A. E. Buchanan, 'Assessing the Communitarian Critique of Liberalism' 99 *Ethics* (1989) pp. 852-882.

especially culture, as inherently linked to group membership, requiring the protection of a group to realise individual rights. This could support collective rights or a collective context on rights and even allows those rights to conflict with individual ones in certain cases. This approach can be seen in the communal interpretation of the right to property in Article 21 of the American Convention and Article 14 of the African Charter. It is also reflected in the right of persons belonging to ethnic, religious and linguistic minorities in Article 27 of the ICCPR, which situates individual rights in a group context and can also address property rights. However, the potential for conflict with individual rights is problematic from a liberal perspective.<sup>47</sup> It is significant that communal interpretations of property rights have not simply been justified by a community's culture, but the necessity of that property for their physical and cultural survival.<sup>48</sup> This is a more serious test and can set tangible limits on property ownership. It also puts subsistence in a pivotal position, as it is the protection of subsistence that justifies this interpretation.

Communal property rights can also be expressed through distinct peoples' rights, such as Article 1 of the Covenants or Article 21 of the African Charter. As distinct peoples' rights, they could draw from nationalism and the right of nations to control their resources, which, if applied within states, is likely to be seen by states as an existential threat to their integrity. Correspondingly, while communal property can be supported under peoples' rights, those rights have been tied to a communitarian liberal formula that is somewhat safer for states, with the same limits as collectively interpreted rights. This also means that these rights are subject to legitimate restrictions for a public purpose like individual property rights.

Third, peoples could be defined collectively as the whole population of a state, with peoples' rights effectively equating to states' rights. This corresponds with a state-based economic

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<sup>47</sup> A. Buchanan, 'The Role of Collective Rights in the Theory of Indigenous Peoples' Rights' 3 *TransnatlL & Contemp Probs* (1993) pp. 91-92, 95.

<sup>48</sup> See S. Wiessner, 'The Cultural Rights of Indigenous Peoples', 22 *EJIL* (2011) p. 129.

nationalism that seeks to construct a national economy through methods like public ownership of resources and regulation of economic activity.<sup>49</sup> This remains important for states and was particularly prominent during post-war decolonisation and the New International Economic Order (NIEO) of the 1970s.<sup>50</sup> The content of this peoples' right varies according to the ideology of public ownership or regulation behind it. However, aligning peoples with states establishes a potentially contrary relationship with the right to property, supporting restrictions on it. These peoples' rights have been called "statist" for this reason.<sup>51</sup> However, it can be noted that state action in economic nationalism is not ultimately judged by its benefit to the state but to the nation or people behind it.<sup>52</sup> This is underlined, for example, in Principle 1 of the Declaration on Permanent Sovereignty over Natural Wealth and Resources, GA Res. 1803(XVII) 1962: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned".<sup>53</sup> This differentiates people from a state and allows for subsistence to be positioned as protection if a government acts against the basic rights of a people.

Article 1(2) proclaims the right of peoples to dispose of their resources in a complex and somewhat ambiguous balance of five elements that can potentially encompass each perspective on property. The first four elements of the right in Article 1(2) relate to an inter-state context and a defence of states' rights as peoples' rights. Peoples have a right to "freely dispose of their natural wealth and resources", subject to "obligations arising out of international economic co-

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<sup>49</sup> See R. Gilpin *The Political Economy of International Relations* (Princeton University Press, Princeton, 1987) p. 31; R. Abdelal, *National Purpose in the World Economy* (Cornell University Press, Ithaca, 2005) p. 151; S. Pryke, 'Economic Nationalism: Theory, History and Prospects' 3 *Global Policy* (2012) pp. 282-285.

<sup>50</sup> See H. S. Zakariya, 'Sovereignty over Natural Resources and the Search for a New International Order', in K. Hossain (ed.), *Legal Aspects of the New International Economic Order* (Frances Pinter, New York, 1980) pp. 208-219.

<sup>51</sup> N. Schrijver, *Sovereignty over Natural Resources* (Cambridge University Press, Cambridge, 1997) pp. 370-371; E. Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law', 38 *Geo. Wash. Int'l L. Rev.* (2006) p. 50.

<sup>52</sup> See Yusuf, *supra* note 2, p. 389.

<sup>53</sup> General Assembly Resolution 1803 (XVII), 14 December 1962, UN Doc. A/RES/1803(XVII) (1962).

operation” and “international law”, though these are based on “mutual benefit”.<sup>54</sup> This structure derives from the drafting of Article 1. This took place from 1952-1955 driven by post-war decolonisation and the aspiration of newly independent states to have greater control of their economies. Those states saw the Article as an opportunity to challenge relations with industrialised states and foreign investors and correspondingly was resisted by those states. The first part of paragraph 2 struck a balance with sufficient ambiguity in its terms to satisfy both groups of states.<sup>55</sup>

The final sentence in Article 1(2), though, pointed to a broader relationship. Regardless of states’ commitments, peoples were not to be placed in a situation in which they were deprived of their means of subsistence. The concept of subsistence was never defined and few examples were given. However, one of the clearest understandings came from the representative of Saudi Arabia: “It was intended to prevent a weak or penniless government from seriously compromising a country’s future by granting concessions in the economic sphere – a frequent occurrence in the nineteenth century.”<sup>56</sup> This again took an inter-state context, while emphasising the need for a state to act for the benefit of its people. However, another example from El Salvador of a tribe in Tanganyika removed from their ancestral land<sup>57</sup> indicated that subsistence could include communities in their relations with a state, albeit in a colonial context.

The drafting of Article 1 was part of a wider movement in the General Assembly to rebalance economic relations through peoples’ rights. Initial drafts of Article 1(2) promoted a right to “permanent sovereignty” over resources. The phrase was dropped in the drafting process,<sup>58</sup> but outside the confines of treaty-making, the Assembly could develop the concept further. It was

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<sup>54</sup> Peru, Third Periodic Report 1995, UN Doc. CCPR/C/83/Add.1, para. 11.

<sup>55</sup> See D. McGoldrick, *The Human Rights Committee* (Clarendon Press, Oxford, 1991) p. 15; J. Summers, *Peoples and International Law* (2nd Edition), (Nijhoff, Leiden, 2014) pp. 344-355.

<sup>56</sup> Saudi Arabia, 25 November 1955, UN Doc. A/C.3/SR.672, para. 36.

<sup>57</sup> El Salvador, 28 November 1955, UN Doc. A/C.3/SR.674, para. 8.

<sup>58</sup> Schrijver, *supra* note 51 pp. 49-53.

expressed most famously in the Declaration on Permanent Sovereignty of 1962, which was primarily focussed on the relationship between peoples/states and foreign investors.<sup>59</sup> Later instruments, such as the General Assembly's Charter on Economic Rights and Duties of States (the NIEO Charter) 1974 simply referred to the right as one of states.<sup>60</sup>

The tension from this interpretation of the peoples' right to resources, as well as a lack of agreement on property rights at the time worked against the inclusion of a right to property in either Covenant.<sup>61</sup> Nonetheless, a state-orientated interpretation of Article 1(2) was neither exclusive nor fixed. The concept of peoples underpinning Article 1(2) and its loose balance of rights and obligations ensured an inherent fluidity. By the time the Covenants entered into force in 1976 decolonisation was drawing to a close and practice over Article 1 was shifting to the relationship between a state and its people.

There have been two elements behind this greater internal focus. First, the protection of means of subsistence highlighted the position of vulnerable sections within states' populations. A notable example is the CESCR's General Comment No. 15 (2002) on the right to water, which identified adequate access to water for subsistence farmers and indigenous peoples as essential for subsistence under Article 1(2).<sup>62</sup>

Second, states themselves in their reports have referred to the different roles of property rights in defining a peoples' right to resources. Instead of mapping on to states' rights, the peoples' right to property in Article 1(2) has been seen to encompass a range of public, private and communal property rights. Moreover, despite the potential for conflict, these rights can co-exist within delimited roles. An example is provided by El Salvador in its Second and Third-Fifth

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<sup>59</sup> T. R. G. van Banning, *The Human Right to Property* (Intersentia, Antwerp, 2002) pp. 45, 154-155; S. K. Banerjee, 'The Concept of Permanent Sovereignty over Natural Resources – An Analysis', 8 *Ind. J.I.L.* (1968) p. 516.

<sup>60</sup> Article 2(1), Charter on the Economic Rights and Duties of States, General Assembly Resolution 3281 (XXIX), 12 December 1974, UN Doc. A/RES/3281(XXIX) (1974).

<sup>61</sup> Van Banning, *supra* note 59, p. 43. W. A. Schabas, 'The Omission of the Right to Property in the International Covenants', 4 *Hague Y.I.L.* (1991) p. 158-159.

<sup>62</sup> CESCR General Comment No. 15, 20 January 2003, E/C.12/2002/11, para. 7.

Periodic Reports to the CESCR in which it reported on private property, state ownership of subsoil and indigenous land tenure all under Article 1(2).<sup>63</sup>

#### **4. The Interaction between Peoples' Rights and the Right to Property in Inter-American and African Jurisprudence**

Some of the most significant practice connecting peoples' rights and the right to property has come from the Inter-American and African human rights systems. Their jurisprudence is significant not only because of the way in which the two rights have informed each other, but because this linkage has drawn from Article 1 of the Covenants. Peoples' rights have shaped the human right to property in the Inter-American system and that right, in turn, has defined the peoples' right to resources in the African Charter. Protection of subsistence has been pivotal to this.

The regional Inter-American human rights system does not recognise any specific peoples' rights. Nevertheless, these rights have been influential in developing a communal interpretation of the right to property in Article 21 of the American Convention in an indigenous and tribal context. Article 21 does not explicitly advance communal property. This interpretation for indigenous and tribal peoples by the Inter-American Court in *Mayagna (Sumo) Awas Tingni v. Nicaragua* in 2001 was seen as an evolution<sup>64</sup> that needed additional support. In this decision and later cases the Court found two distinct foundations for this interpretation. The first related to the subsistence of the community, expressed as its physical and cultural survival. The second involved additional rights outside the American Convention in national law and other international instruments.

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<sup>63</sup> El Salvador, Second Periodic Report 2004, UN Doc. E/1990/6/Add.39, paras. 28 and 31 and Third-Fifth Periodic Report 2011, UN Doc. E/C.12/SLV/3-5, para. 17.

<sup>64</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, IACtHR, Judgment, para. 148, <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf)>, visited 22 September 2018.

The survival of the community, a term the Court treated as interchangeable with “subsistence”,<sup>65</sup> fundamentally underpinned communal property rights. Communal property was not just based on the cultural traditions of a community, but its necessity for its physical and cultural survival and transmission of its culture to future generations.<sup>66</sup>

This revealed three closely interconnected aspects to survival. First, it involved the land and resources necessary for the physical integrity of an indigenous community, such as food, water, housing and medicinal plants.<sup>67</sup> Second, it involved not just physical existence, but also the cultural integrity of a group<sup>68</sup> and a connection to land and resources, defined not only by physical needs but spiritual ties<sup>69</sup> and access to sacred sites.<sup>70</sup> Third, this physical and cultural integrity was viewed inter-generationally, with rights to land and resources being based on their traditional use “for centuries”,<sup>71</sup> and their preservation necessary for the transmission of culture to future generations.<sup>72</sup> The test of necessity for physical and cultural survival meant that rights over land also included natural resources found on the land on which a group depended.<sup>73</sup> However, while this necessity could support rights over those resources, it could also limit them. In *Saramaka v. Suriname* (2007) gold was not considered essential to that people’s

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<sup>65</sup> See, e.g., *Saramaka*: “[T]he forests within Saramaka territory provide a home for the various animals they hunt for subsistence, and it is where they gather fruits and other resources essential for their survival... In this sense, wood-logging activities in the forest would also likely affect such subsistence resources. That is, the extraction of one natural resource is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival of the Saramakas.” *Saramaka People v. Suriname*, 28 November 2007, IACtHR, Judgment, para. 90, <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf)>, visited 22 September 2018.

<sup>66</sup> *Ibid.*, para. 126; *Awas Tingni*, *supra* note 64, para. 149; *Moiwana Community v. Suriname*, 15 June 2005, IACtHR, Judgment, para. 131 <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_124\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf)>, visited 22 September 2018; *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005, IACtHR, Judgment, para. 131, <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_125\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf)>, visited 22 September 2018; *Kichwa Indigenous People of Sarayaku v. Ecuador*, 27 June 2012, IACtHR, Judgment, paras. 146-155, <[http://www.corteidh.or.cr/docs/asuntos/sarayaku\\_20\\_01\\_12\\_ing.pdf](http://www.corteidh.or.cr/docs/asuntos/sarayaku_20_01_12_ing.pdf)>, visited 22 September 2018; *Kaliña and Lokono Peoples v. Suriname*, 25 November 2015, IACtHR, Judgment, paras. 151-152, 164-167, <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_309\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf)>, visited 22 September 2018.

<sup>67</sup> See *Yakye Axa*, *supra* note 66, para. 168;

<sup>68</sup> *Ibid.*, para. 135.

<sup>69</sup> *Kichwa*, *supra* note 66, para. 155.

<sup>70</sup> *Kaliña and Lokono*, *supra* note 66, paras. 130, 167.

<sup>71</sup> *Saramaka*, *supra* note 65, para. 121.

<sup>72</sup> *Yakye Axa*, *supra* note 66, para. 154.

<sup>73</sup> “[T]he right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected to the protection of natural resources in the territory.” *Kichwa*, *supra* note 66, para. 146.

culture, though the process of its extraction impacted on a vital resource for their survival, water, which required consultation.<sup>74</sup>

In relation to Article 21, physical and cultural survival determined the balance between the right to property and legitimate restrictions. As communal rights necessarily required community decision-making, proportionality included standards for consultation: being timely, conducted in good faith with the aim to achieve consent, respect for indigenous institutions, and informed by social and environmental impact assessment.<sup>75</sup> Compensation expanded to encompass benefit-sharing. Physical and cultural survival defined proportionality as the necessary safeguard for protecting a community's means of subsistence.<sup>76</sup>

In addition, the Court relied on external provisions on indigenous land rights. Article 29(b) of the American Convention provided that its interpretation should not restrict other rights. The Court used this Article to import standards from national laws and international instruments, notably ILO Convention 169<sup>77</sup> and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>78</sup> Many of these provisions were based on self-determination. Communal property rights in the Nicaraguan Constitution cited in *Awes Tingni* were grounded in a general reference to self-determination.<sup>79</sup> Rights to land and resources in UNDRIP were also seen as an expression of this right.<sup>80</sup> ILO Convention 169 had a more difficult relationship as the

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<sup>74</sup> *Saramaka*, *supra* note 65, para. 155.

<sup>75</sup> *Ibid.*, paras. 129 and 133.

<sup>76</sup> *Ibid.*, paras. 129-132.

<sup>77</sup> *Yakye Axa*, *supra* note 66, paras. 126-127; *Kichwa*, *supra* note 66, paras. 161, 163. See L. Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', 21 EJIL (2010) p. 587.

<sup>78</sup> *Kaliña and Lokono*, *supra* note 66, para. 202.

<sup>79</sup> *Awes Tingni*, *supra* note 64, paras. 116 and 153.

<sup>80</sup> S. Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights', in S. Allen and A. Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, Oxford, 2011) p. 364.



Convention distinguished indigenous peoples from ‘peoples’ in international law,<sup>81</sup> though ILO experts have considered the instrument to express aspects of self-determination.<sup>82</sup>

The Court also specifically engaged with self-determination citing Article 1 of the Covenants, together with Article 27 of the ICCPR. These Articles were raised in cases involving Suriname, which was not party to ILO Convention 169 but had ratified the two Covenants. In *Saramaka v. Suriname* the Court derived a communal interpretation of the right to property from the two Covenant articles:

[T]he right to property protected under Article 21 of the American Convention, interpreted in light of the rights recognized under common Article 1 and Article 27 of the ICCPR, which may not be restricted in interpreting the American Convention, grants to the members of the Saramaka community the right to enjoy property in accordance with their communal tradition.<sup>83</sup>

Common Article 1 provided the primary basis for establishing a collective interpretation of property rights. (Article 27 was positioned in a secondary role.) The Court cited CESCR practice that applied the Article to indigenous and tribal peoples, enabling them to “freely pursue their economic, social and cultural development”, “freely dispose of their natural wealth and resources” and not to be “deprived of [their] own means of subsistence”.<sup>84</sup>

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<sup>81</sup> Article 1(3), ILO Convention 169 (adopted 27 June 1986, entry into force 5 September 1991), <[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169)>, visited 24 September 2018.

<sup>82</sup> Indigenous and Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169 (International Labour Standards Department 2009) pp. 25-26.

<sup>83</sup> *Saramaka*, *supra* note 65, para. 95.

<sup>84</sup> *Ibid.*, para. 93.

The influence of the Article was even more substantial in *Kaliña and Lokono v. Suriname* (2015), with the Court framing the right to property on the same terms as self-determination in Article 1(1) of the Covenants:

[A]n interpretation of Article 21 of the American Convention that requires recognition of the right of the members of indigenous and tribal peoples to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied.<sup>85</sup>

However, there was a crucial difference between this phrasing and the right in Article 1. While this communal interpretation of Article 21 was couched in the terminology of self-determination, the right was still held by members of indigenous and tribal peoples, rather than peoples themselves. This was a hybrid individual-collective structure rather than a purely collective right. The potential for conflict between the communal right to property and individual property rights was also recognised. The Court asserted that neither right *prima facie* could take priority and any dispute between the two needed to be resolved on a case by case basis.<sup>86</sup> However, the necessary connection between communal property and the survival of a group does suggest a greater weight behind the communal right.<sup>87</sup>

While peoples' rights in Inter-American jurisprudence supported a communal interpretation of property rights, in the African system this interplay was inverted – property rights defined the content of peoples' rights, specifically the peoples' right to resources. The African Charter on Human and Peoples' Rights contains both a right to property in Article 14 and a peoples' right

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<sup>85</sup> *Kaliña and Lokono*, *supra* note 66, para. 124.

<sup>86</sup> *Ibid.*, paras. 155-157.

<sup>87</sup> See *Yakye Axa*, *supra* note 66, paras. 146-149.

to resources in Article 21. The African Commission and the African Court on Human and Peoples' Rights in their jurisprudence established an intimate connection between these rights, with the Commission relying heavily on Inter-American jurisprudence to do so. American cases supported a communal interpretation of Article 14 of the African Charter, which was directly extended to Article 21.

The African Commission on Human and Peoples' Rights had earlier addressed the peoples' right to resources in *SERAC v. Nigeria* ['Ogoniland'] in 2001. In this decision, the Commission effectively constructed a peoples' right to resources from multiple violations of individual rights directed at the Ogoni ethnic group.<sup>88</sup> Article 21 was treated as a collectivisation of individual rights.

However, subsequent Inter-American jurisprudence allowed the Commission in the *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya* ['Endorois'] in 2009 to take a new approach based on the right to property. The Commission utilised Inter-American jurisprudence on Article 21 of the American Convention as a template for translating the right to property in Article 14 of the Charter into the right to resources in Article 21. According to the Commission:

The American Convention does not have an equivalent of the African Charter's Article 21 on the Right to Natural Resources. It therefore reads the right to natural resources into the right to property (Article 21 of the American Convention), and in turn applies similar limitation rights on the issue of natural resources as it does on limitations of the right to property.<sup>89</sup>

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<sup>88</sup> *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* ['Ogoniland'], Communication No. 155/96, 27 October 2001, ACHPR, paras. 55-58, <[http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf)>, visited 22 September 2018.

<sup>89</sup> *Endorois*, *supra* note 17, para. 256.

The African Court on Human and Peoples' Rights also addressed the right to resources in Article 21 in *Ogiek Community v. Kenya* in 2017, though without any reliance on Inter-American jurisprudence. Nonetheless, the Court followed the same approach as the Commission, with a right to property providing the blueprint for the right to resources. In particular, after dividing the right to property according to three traditional elements of property ownership (*usus, fructus, abusus*), the Court simply transferred those elements into the right to resources without any change of context.<sup>90</sup>

The text of Article 21 proclaims a right to freely dispose of resources, not just land, and the Commission in *Endorois* asserted that this was vested in an indigenous people. However, the Commission was also quick to qualify this by endorsing the approach to resources in *Saramaka* (with rubies instead of gold) and quoting the legitimate restrictions on property in Article 14.<sup>91</sup> This seemed to pull back from a distinctive peoples' right to resources in favour of an equivalence with communal property under Article 14.

In *Endorois*, the touchstone for a communal interpretation of Article 14<sup>92</sup> and the peoples' right to resources in Article 21<sup>93</sup> was physical and cultural survival identified by the Inter-American Court and again equated with subsistence.<sup>94</sup> Restrictions on the right in Article 21 were imported straight from Article 14, "the two-pronged test of 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws'",<sup>95</sup> though limits from the American Convention were also relied on.<sup>96</sup> These restrictions were subject to

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<sup>90</sup> *African Commission on Human and Peoples' Rights v. Kenya* [ '*Ogiek Community*' ], Application No. 006/2012, 26 May 2017, ACtHPR, Judgment, para. 201, <<http://www.african-court.org/en/index.php/56-pending-cases-details/864-app-no-006-2012-african-commission-on-human-and-peoples-rights-v-republic-of-kenya-details>>, visited 22 September 2018.

<sup>91</sup> *Endorois*, *supra* note 17, paras. 266-268.

<sup>92</sup> *Ibid.*, paras. 197 and 212.

<sup>93</sup> *Ibid.*, paras. 260 and 261. Citing the *Yakye Axa* and *Sawhoyamaya* cases.

<sup>94</sup> *Ibid.*, paras. 287-288.

<sup>95</sup> *Ibid.*, para. 267.

<sup>96</sup> *Ibid.*, paras. 256 and 265.

proportionality, which in the context of survival could raise the threshold for interference for both Article 14<sup>97</sup> and Article 21.<sup>98</sup> Likewise, as both rights involved communal interests, proportionality required consultation, modelled for both Articles 14 and 21 on the standards in *Saramaka*.<sup>99</sup> The compensation element in proportionality, again citing *Saramaka*, was expanded into a requirement for benefit-sharing in both articles.<sup>100</sup>

A critical though controversial element in a consultation process is the extent to which it depends on consent. Here the text of Article 21 could potentially deviate from Article 14 as it includes a specific standard. Article 21(2) provides that in cases of spoliation, dispossessed people have a right to the lawful recovery of lost property and compensation. This suggested that communities did not have a veto over interference with their resources but were entitled to reparation if this took place. However, this corresponded with Article 14, in which the object of consultation was to “seek consent – or to compensate”.<sup>101</sup> Consent for both Articles was a goal but not a veto.

*Endorois* broke down any significant barrier between the communal interpretation of the right to property and a peoples’ right to resources. The unfortunate consequence, however, was that it left the peoples’ right to resources effectively duplicative, without an obvious independent content or contribution. This relationship was affirmed by the African Court in *Ogiek Community*, which held that “so far as” the property rights of the community had been breached under Article 14, the respondent state had also violated Article 21.<sup>102</sup>

African jurisprudence is also significant for a building a connection between the rights to property and resources beyond an indigenous context. While the Commission in *Endorois* relied heavily on Inter-American jurisprudence in an indigenous or tribal context, it also drew

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<sup>97</sup> *Ibid.*, paras. 212-216.

<sup>98</sup> *Ibid.*, para. 256.

<sup>99</sup> *Ibid.*, paras. 227-228, 266-268.

<sup>100</sup> *Ibid.*, paras. 225-228 and 266.

<sup>101</sup> *Ibid.*, para. 226.

<sup>102</sup> *Ogiek Community*, *supra* note 90, para. 201.

more broadly from the European Court of Human Rights on traditional property. In particular, it cited *Doğan v. Turkey* (2004), which upheld descent-based property ownership, and communal rights to grazing and tree-felling for Kurds in Turkey<sup>103</sup> – a population usually considered a minority rather than indigenous.<sup>104</sup>

African jurisprudence also shows that subsistence could inform property rights beyond an indigenous context. In *COHRE v. Sudan* in 2009, the property rights of villagers in Darfur were threatened by government-orchestrated attacks from Janjaweed militias. The African Commission again drew from *Doğan*<sup>105</sup> to support rights to traditional property ownership for this population:

It doesn't matter whether they [the complainants] had legal titles to the land, the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by Article 14.<sup>106</sup>

Similarly, in *Nubian Community* (2015), Nubian descendants of conscripts who settled in the outskirts of Nairobi in the early 1900s were found to be entitled to recognition of “at least some of the land as their communal property” despite a lack of formal title.<sup>107</sup> Although not

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<sup>103</sup> *Endorois*, *supra* note 17, paras. 188-189. *Doğan v. Turkey*, Application Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29 June 2004, ECtHR, Judgment, paras. 138-139, <[https://hudoc.echr.coe.int/eng#{%22appno%22:\[%228813/02%22\],%22itemid%22:\[%22001-61854%22\]}>](https://hudoc.echr.coe.int/eng#{%22appno%22:[%228813/02%22],%22itemid%22:[%22001-61854%22]}>), visited 22 September 2018.

<sup>104</sup> See CESCR Concluding Observations, Turkey, 20 May 2011, E/C.12/TUR/CO/1, para. 10; HRC Concluding Observations, Turkey, 30 October 2012, CCPR/C/TUR/CO/1, para. 9.

<sup>105</sup> *COHRE v. Sudan*, *supra* note 45, paras. 195-201.

<sup>106</sup> *Ibid.*, para. 205.

<sup>107</sup> *Nubian Community in Kenya v. Kenya*, Communication No. 317/2006, 28 February 2015, ACHPR, Decision, para. 160, <[http://www.achpr.org/files/sessions/17th-ao/comunications/317.06/communication\\_317.06\\_eng.pdf](http://www.achpr.org/files/sessions/17th-ao/comunications/317.06/communication_317.06_eng.pdf)>, visited 22 September 2018.

indigenous, the Commission supported communal rights from spiritual ties to the land, burial of the dead and the identity of the community,<sup>108</sup> alongside security of tenure for individuals.<sup>109</sup> Jurisprudence from the Inter-American and African systems, therefore, points to a close and fluid relationship between the right to property and the peoples' right to resources. In the Inter-American system, peoples' rights directly informed the right to property. In the African system the right to property provided the framework for the peoples' right to resources. Moreover, the basis for a communal interpretation of property rights – necessity for the survival or subsistence of a community – is not just limited to an indigenous and tribal context but has a broader application. This is relevant for property rights under Article 1 of the Covenants.

## **5. Property Rights under Article 1 of the Covenants**

The Inter-American Court's use of Article 1 to interpret the right to property suggests that this Article has a more positive relationship with property rights than its drafting might suggest. Subsequent practice both by states in their reporting obligations and observations by the CESCR and HRC support this. Property rights inform Article 1 in four contexts: indigenous peoples; the general population; subsistence farmers and traditional land owners; and minorities.

In evaluating this practice, it is important to first note a difference between the HRC and CESCR in practice on Article 1. In the ICCPR, rights relating to communities are divided between two articles: the collective right of peoples in Article 1 and the individually framed but communally contextualised right of persons belonging to minorities in Article 27. The

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<sup>108</sup> *Ibid.*, para. 158

<sup>109</sup> *Ibid.*, paras. 160-163.

division of labour between the Covenants, with the focus of the ICCPR on civil and political rights has meant that the HRC has had to address controversial political aspects of self-determination under Article 1. As previously mentioned, the HRC has refused to consider Article 1 under Optional Protocol I, with communications over issues of land and resources being reconsidered under Article 27.<sup>110</sup> Likewise, in reporting, the HRC has tended to address rights to land and resources under Article 27 rather than Article 1.<sup>111</sup> However, the distinction between ‘peoples’ and ‘minorities’ in the two Articles has also been ambiguous. The HRC distinguished the two, not by the groups they address, but the fact that Article 27 was held by individuals.<sup>112</sup> It also considered Article 1 to be relevant for the interpretation of Article 27<sup>113</sup> and sometimes addressed the same issue under both rights<sup>114</sup> suggesting that the reverse is true. This overlap means that HRC practice on Article 27 can be considered relevant for Article 1. The CESCR, by contrast, has a different relationship with Article 1. Although some rights in the ICESCR are particularly relevant to minorities, such as the right to culture in Article 15, there is no division of group rights like in the ICCPR. Moreover, the focus of the ICESCR has allowed the CESCR to view its mandate as limited to the economic, social and cultural aspects of self-determination, which pose less of a threat to the integrity of states parties. How far the right can be limited in this way is questionable and has not yet been tested in communications. Economic interests and the distribution of wealth within states have often been central for secessionist movements, such as in Catalonia, and economic self-determination easily overlaps with a political right. Still, within these limits the CESCR has been much more assertive in

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<sup>110</sup> *Poma Poma v. Peru*, Communication No. 1457/2006, 27 March 2009, HRC, View, paras. 6.3 and 6.5, <<http://juris.ohchr.org/Search/Details/1495>>, visited 22 September 2018.

<sup>111</sup> See, e.g., HRC, Concluding Observations on Australia, 6 November 2017, UN Doc. CCPR/C/AUS/CO/6, paras. 51-52.

<sup>112</sup> HRC General Comment No. 23, *supra* note 39, para. 3.1.

<sup>113</sup> *J. G. A. Diergaardt et al. v. Namibia* (2000) Communication No. 760/1997, HRC, View, para. 10.3, <<http://juris.ohchr.org/Search/Details/881>>, visited 22 September 2018; *Apirana Mahuika v. New Zealand*, Communication No. 547/1993, 27 October 2000, HRC, View, para. 9.2 <http://juris.ohchr.org/Search/Details/897>, visited 24 September 2018.

<sup>114</sup> HRC, Concluding Observations on Mexico, 23 March 2010, UN Doc. CCPR/C/MEX/CO/5, para. 22.



addressing rights to land and resources for various communities under Article 1. Its Reporting Guidelines of 2008 specifically call on states to report under Article 1 on the protection of indigenous peoples' ownership of territories or use of lands for traditional sources of livelihood, as well as processes for consultation and seeking prior informed consent.<sup>115</sup> This has framed the discussion of indigenous property rights under Article 1 and subsequent committee practice has focussed more on these communities than any other.

## 5.1 Indigenous Peoples

The most extensive practice by the CESCR and HRC on property rights addresses indigenous peoples. The Committee has indicated standards over title, delimitation of territory and consultation in the event of interference with land and resources.

Effective protection of property needs recognition of title, which also requires delimitation.<sup>116</sup> Inter-American jurisprudence has highlighted that while delimitation and legal recognition are essential for judicial protection of indigenous land rights under domestic law,<sup>117</sup> the rights themselves are based on traditional possession.<sup>118</sup> The CESCR has taken a similar instrumental approach to recognition and delimitation under Article 1(2).<sup>119</sup> Demarcation and titling have been viewed as important for the effective protection of land rights but those lands are possessed “by reason of traditional ownership or other traditional occupation or use.”<sup>120</sup> The

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<sup>115</sup> CESCR, Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, 18 November 2009, UN Doc. E/C.12/2008/2, para. 8.

<sup>116</sup> CESCR Concluding Observations on Guatemala, 28 November 2014, UN Doc. E/C.12/GTM/CO/3, para. 6.

<sup>117</sup> *Yakye Axa*, *supra* note 66, para. 143.

<sup>118</sup> *Sawhoyamaya v. Paraguay*, 29 March 2006, IACtHR, Judgment, paras. 127-128, [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_146\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf), visited 24 September 2018.

<sup>119</sup> “[G]uarantee the right of indigenous peoples to dispose freely of their lands, territories and natural resources, by such means as providing legal recognition and the necessary legal protection.” CESCR Concluding Observations on Chile, 19 June 2015, UN Doc. E/C.12/CHL/CO/4, para. 8.

<sup>120</sup> CESCR Concluding Observations on Venezuela, 19 June 2015, UN Doc. E/C.12/VEN/CO/3, para. 9.

process for establishing title under Article 1 has been considered to require clear criteria and accessible mechanisms,<sup>121</sup> while delimitation of territory should be conducted in consultation with the community.<sup>122</sup>

Interference with property rights has been addressed under both Articles 1 and 27. However, as Article 27 has been the subject of communications, standards have received closer consideration under this article. Both Articles work within a framework of state sovereignty in which states have a right to regulate economic activity. A balance between states' economic rights and the rights of minorities<sup>123</sup> has been focused on by the HRC in the first instance on the notion of a threshold of interference. Actions with only a "limited impact"<sup>124</sup> might not constitute interference, though activities can be considered cumulatively so that a series of small impacts and even future plans could cross the threshold.<sup>125</sup>

Article 27 approaches property from the cultural rights of minorities. Article 1(2), by contrast, directly asserts the right of peoples to freely dispose of their resources.<sup>126</sup> The CESCR has expanded on this, citing Article 26(2) of UNDRIP, that it is a right to "own, use, develop and control lands, territories and resources".<sup>127</sup> Nonetheless, the right is also relative as states are entitled to extract resources or make concessions to private companies for their extraction.<sup>128</sup> The standard the CESCR has used is whether activities negatively affect the enjoyment of economic, social and cultural rights.<sup>129</sup> This again underlines the notion of a threshold of

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<sup>121</sup> CESCR Concluding Observations on Guyana, 9 October 2015, UN Doc. E/C.12/GUY/CO/2-4, paras. 14-16.

<sup>122</sup> CESCR Concluding Observations on Venezuela, 19 June 2015, UN Doc. E/C.12/VEN/CO/3, para. 9.

<sup>123</sup> See *Kitok v. Sweden*, Communication No. 197/1985, 27 July 1988, HRC, View, para. 9.2, <<http://juris.ohchr.org/Search/Details/543>>, visited 22 September 2018.

<sup>124</sup> *Länsman v. Finland*, Communication No. 511/92, 26 October 1994, HRC, View, para. 9.4, <<http://juris.ohchr.org/Search/Details/722>>, visited 22 September 2018; *Poma Poma*, *supra* note 110, para. 7.4. See also HRC Concluding Observations on Guatemala, 28 March 2018, UN Doc. CCPR/C/GTM/CO/4 para. 39.

<sup>125</sup> *Länsman v. Finland*, Communication No. 1023/2001, 17 March 2005, HRC, View, para. 10.2, <<http://juris.ohchr.org/Search/Details/1157>>, visited 22 September 2018.

<sup>126</sup> See CESCR Concluding Observations on Angola, 24 June 2016, UN Doc. E/C.12/AGO/CO/4-5, para. 20.

<sup>127</sup> See, e.g., CESCR Concluding Observations on Costa Rica, 7 October 2016, UN Doc. E/C.12/CRI/CO/5, para. 9.

<sup>128</sup> See, e.g., CESCR Concluding Observations on Finland, 28 November 2014, UN Doc. E/C.12/FIN/CO/6, para. 9.

<sup>129</sup> *Ibid.* See also, e.g., CESCR Concluding Observations on Honduras, 24 June 2016, UN Doc. E/C.12/HND/CO/2, paras. 11-12.

interference, though its contours are unclear, as it has not been elaborated in the same way as Article 27.

Interference requires consultation and this process needs to be consistent and based on law rather than discretion.<sup>130</sup> The elements in a consultation process have been addressed in concluding observations by the CDESCR and HRC on Article 1 and in HRC jurisprudence on Article 27.

The first is timing. The consultation must take place prior to the approval of potential acts,<sup>131</sup> but the CDESCR in 2014 Concluding Observations on Guatemala emphasised the importance of “sufficient time and opportunity to reflect and take a decision”.<sup>132</sup>

Second, it should be inclusive, reflecting the traditions and culture of a community<sup>133</sup> and involve relevant indigenous institutions and key stakeholders.<sup>134</sup> HRC jurisprudence on Article 27 has engaged with differences in interests between a community as a whole and individuals within it or sections of that community.<sup>135</sup> In *Mahuika v. New Zealand* the HRC considered that there needed to be “reasonable and objective justification” to distinguish the rights of particular individuals in a group from the group as a whole.<sup>136</sup>

Third, it should be informed. The CDESCR has identified the need for human rights and environmental impact assessment under Article 1(2)<sup>137</sup> and the HRC in *Poma Poma v. Peru*

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<sup>130</sup> See CDESCR Concluding Observations on Mexico, 29 March 2018, UN Doc. E/C.12/MEX/CO/5-6, paras. 12-13; HRC Concluding Observations on Liberia, 23 July 2018, CCPR/C/LBR/CO/1, paras. 46-47.

<sup>131</sup> See *Mahuika*, *supra* note 113, para. 9.8.

<sup>132</sup> CDESCR Concluding Observations, Guatemala, 28 November 2014, UN Doc. E/C.12/GTM/CO/3, para. 7.

<sup>133</sup> CDESCR Concluding Observations on Mexico, 29 March 2018, UN Doc. E/C.12/MEX/CO/5-6, para. 13.

<sup>134</sup> *Länsman v. Finland*, Communication No. 671/1995, 30 October 1996, HRC, View, para. 10.5, <<http://juris.ohchr.org/Search/Details/743>>, visited 22 September 2018.

<sup>135</sup> See *Sandra Lovelace v. Canada*, Communication No. 24/1977, 30 July 1980, HRC, View, para. 16, <<http://juris.ohchr.org/Search/Details/286>>, visited 22 September 2018; *Kitok v. Sweden*, *supra* note 123, para. 9.8.

<sup>136</sup> See *Mahuika*, *supra* note 113, para. 9.6. See also *Kalevi Paadar et al. v. Finland*, Communication No. 2102/2011, 26 March 2014, HRC, View, paras. 7.5-7.7 and Joint Dissenting Opinion of W. Kälin, V. M. Rodríguez Rescia, A. Seibert-Fohr and Y. Shany, <<http://juris.ohchr.org/Search/Details/1817>>, visited 22 September 2018.

<sup>137</sup> See, e.g., CDESCR Concluding Observations on Mexico, 29 March 2018, UN Doc. E/C.12/MEX/CO/5-6, para. 13.

found the failure of the state to require an independent impact assessment contributed to a violation of Article 27.<sup>138</sup>

Fourth, it should be effective. The HRC in *Äärelä and Näkkäläjärvi v. Finland* found that the alteration of plans following a consultation complied with Article 27.<sup>139</sup> Perhaps the most significant question for effectiveness, though, is the role of consent. In this area, the approach by both the CESCR and HRC to free, prior and informed consent has varied. The CESCR in some concluding observations has called for indigenous peoples to be consulted “with a view to obtaining their free, prior and informed consent”,<sup>140</sup> which positions consent as a good faith aspiration, rather than a strict veto. However, in others it has called for states “to ensure that the free, prior and informed consent of indigenous peoples is obtained”,<sup>141</sup> which points to a stronger standard. The HRC in *Poma Poma v. Peru* elaborated that “effective” consultation “requires... the free, prior and informed consent of the members of the community”,<sup>142</sup> though this was not actually applied as no consultation took place. In recent concluding observations it has referred to consultation “with a view to obtaining... free, prior and informed consent”.<sup>143</sup> The requirement for consent in this process could also be determined by protection of subsistence. This has been most notably expressed by the HRC in *Poma Poma*, which recognised the application of proportionality “so as not to endanger the very survival of the community and its members”.<sup>144</sup> The precise role of this principle was ultimately not clarified, but it suggests the need for higher standards where activities have a greater impact on the subsistence of a community. This is consistent with Inter-American jurisprudence.<sup>145</sup>

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<sup>138</sup> *Poma Poma*, *supra* note 110, para. 7.7.

<sup>139</sup> *Äärelä and Näkkäläjärvi v. Finland*, Communication No. 779/1997, 24 October 2001, HRC, View, para. 7.6, <<http://juris.ohchr.org/Search/Details/939>>, visited 22 September 2018.

<sup>140</sup> *See*, e.g., CESCR Concluding Observations on Honduras, 24 June 2016, UN Doc. E/C.12/HND/CO/2, paras. 11-12.

<sup>141</sup> *See*, e.g., CESCR Concluding Observations on Bangladesh, 29 March 2018, UN Doc. E/C.12/BDG/CO/1, para. 16.

<sup>142</sup> *Poma Poma*, *supra* note 110, para. 7.6.

<sup>143</sup> HRC Concluding Observations on Guatemala, 28 March 2018, UN Doc. CCPR/C/GTM/CO/4, para. 39.

<sup>144</sup> *Poma Poma*, *supra* note 110, para. 7.6.

<sup>145</sup> *Saramaka*, *supra* note 65, para. 134. *See* K. Göcke, ‘The Case of *Ángela Poma Poma v Peru* before the Human

## 5.2 Property Rights among the General Population

Protection of means of subsistence and the derivation of a right to resources from property is not limited to indigenous peoples but can apply to the whole population of a state with special significance for vulnerable parts of it. This corresponds with CESCR General Comment No. 7 on forced evictions, which has been cited by the Committee in concluding observations on Article 1<sup>146</sup> and refers to the vulnerability of women, ethnic minorities and indigenous peoples.<sup>147</sup> The vulnerability of a whole state's people in its subsistence can be illustrated in the CESCR's 2008 Concluding Observation on Nicaragua, in which it raised high levels of poverty and extreme poverty in the general population as an issue under Article 1(2).<sup>148</sup>

The CESCR has raised property rights and their implications for subsistence under Article 1 on a number of occasions. In its 2015 Concluding Observations on Sudan it called on the state not to cede land to investors without conducting a human rights impact assessment and seeking community consent because of the dependency of those communities on land for their livelihood.<sup>149</sup> This has not been limited to rural populations. In the case of the Map Ta Phut Industrial Estate, the Committee called for consultation with individuals and communities affected by the construction of Thailand's largest industrial park.<sup>150</sup> Vulnerability from the lack of protection of property rights may also be defined along gender lines. The CESCR in its

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Rights Committee', 14 MPYUNL (2010) pp. 367-368.

<sup>146</sup> CESCR Concluding Observations on Iraq, 9 October 2015, UN Doc. E/C.12/IRQ/CO/4, para. 14; Concluding Observations on Thailand, 19 June 2015, UN Doc. E/C.12/THA/CO/1-2, para. 10.

<sup>147</sup> CESCR General Comment No. 7, *supra* note 35, para. 10.

<sup>148</sup> CESCR Concluding Observations on Nicaragua, 20 November 2008, UN Doc. E/C.12/NIC/CO/4, para. 10.

<sup>149</sup> CESCR Concluding Observations on Sudan, 9 October 2015, UN Doc. E/C.12/SDN/CO/2, para. 12.

<sup>150</sup> CESCR Concluding Observations on Thailand, 19 June 2015, UN Doc. E/C.12/THA/CO/1-2, para. 10.

2015 Concluding Observations on Uganda highlighted the disproportionate effect of land-grabbing on women.<sup>151</sup>

States reports show substantial recognition for individual property rights in the implementation of Article 1.<sup>152</sup> For example, Tanzania in its 2009 report to the CESCR stated that:

[E]very person has the right to own or hold any property and to freely dispose of such property. The Constitution directs that it shall be unlawful for any person to be dispossessed of his property for purposes of nationalisation or any other expropriation unless it is done in accordance with the law which must provide for adequate, prompt and fair compensation.<sup>153</sup>

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<sup>151</sup> CESCR Concluding Observations on Uganda, 19 June 2015, UN Doc. E/C.12/UGA/CO/1, paras. 12 and 14. *See also* HRC, Concluding Observations on Liberia, 23 July 2018, UN Doc. CCPR/C/LBR/CO/1, para. 47.

<sup>152</sup> Before the Committee on Economic, Social and Cultural Rights *see*: Chile, Third Periodic Report 2003, UN Doc. E/1994/104/Add.26, para. 52; Malta, Initial Report 2003, UN Doc. E/1990/5/Add.58, para. 4; Latvia, Initial Report 2005, UN Doc. E/1990/5/Add.70, para. 8; Nepal Second Periodic Report 2006, UN Doc. E/C.12/NPL/2, para. 96; Kazakhstan, Initial Report 2007, UN Doc. E/C.12/KAZ/1, para. 115; Madagascar, Second Periodic Report 2007, UN Doc. E/C.12/MDG/2, para. 131; Cambodia, Initial Report 2008, UN Doc. E/C.12/KHM/1, para. 71; Mauritania, Initial Report 2009, UN Doc. E/C.12/MRT/1, para. 135; Tanzania, Initial, Second and Third Periodic Report 2009, UN Doc. E/C.12/TZA/1-3, para. 30; Kuwait, Second Periodic Report 2010, UN Doc. E/C.12/KWT/2, para. 59; Mexico, Fifth and Sixth Periodic Reports 2012, UN Doc. E/C.12/MEX.5-6, para. 3; Burundi, Initial Report 2013, UN Doc. E/C.12/BDI/1, para. 42; Angola, Fourth and Fifth Periodic Reports 2014, UN Doc. E/C.12/AGO/4-5, para. 18; Burkina Faso, Initial Report 2015, UN Doc. E/C.12/BFA/1, para. 43; Cape Verde, Initial Report 2017, UN Doc. E/C.12/CPV/1, para. 10.

Before the Human Rights Committee *see*: Costa Rica, Fourth Periodic Report 1998, UN Doc. CCPR/C/103/Add.6, paras. 2-4; Georgia, Second Periodic Report 2000, UN Doc. CCPR/C/GEO/2000/2, para. 34; Togo, Report 2001, UN Doc. CCPR/C/TGO/2001/3, para. 59; El Salvador, Third Periodic Report 2002, UN Doc. CCPR/C/SLV/2002/3, para. 50; Uganda, Initial Report 2003, UN Doc. CCPR/C/UGA/2003/1, para. 49; Namibia, Initial Report 2003, UN Doc. CCPR/C/NAM/2003/1, para. 183; Benin, Initial Report 2004, UN Doc. CCPR/C/BEN/2004/1, para. 42; Greece, Initial Report 2004, UN Doc. CCPR/C/GRC/2004/1, para. 6; Barbados, Third Periodic Report 2006, UN Doc. CCPR/C/BRB/3, para. 83; Botswana, Initial Report 2006, UN Doc. CCPR/C/BWA/1, para. 85; Nicaragua, Third Periodic Report 2007, UN Doc. CCPR/C/NIC/3, para. 14; Monaco, Second Periodic Report 2007, UN Doc. CCPR/C/MCO/2, paras. 268-270; Turkmenistan, Initial Report 2010, UN Doc. CCPR/C/TKM/1, para. 8; Macau SAR, Initial Report 2011, UN Doc. CCPR/C/CHN-MAC/1, para. 22; Albania, Second Periodic Report 2011, UN Doc. CCPR/C/ALB/2, paras. 14-16; Côte d'Ivoire, Initial Report 2013, UN Doc. CCPR/C/CIV/1, paras. 43-44; Macedonia, Third Periodic Report 2013, UN Doc. CCPR/C/MKD/3, paras. 62-63; Liberia, Initial Report 2016, UN Doc. CCPR/C/LBR/1, paras. 7-11; Lebanon, Third Periodic Report 2016, UN Doc. CCPR/C/LBN/3, para. 8; Laos, Initial Report 2017, UN Doc. CCPR/C/LAO/1, para. 8; Angola, Second Periodic Report 2017, UN Doc. CCPR/C/AGO/2, paras. 24-25; Belize, Initial Report 2017, UN Doc. CCPR/C/BLZ/1, para. 8.

<sup>153</sup> Tanzania, Combined Initial, Second and Third Periodic Reports 2009, UN Doc. E/C.12/TZA/1-3, para. 30.

Likewise, Angola in its 2014 report to the CESCR on Article 1 referred to constitutional amendments that improved implementation of the ICESCR, which included, first of all, recognition of the right to property.<sup>154</sup> Liberia in its 2016 report to the HRC referred to the importance of land rights for its post-conflict security, and detailed under Article 1 legislation to recognise and delimit public, government, customary and private property.<sup>155</sup> This widespread reporting strongly suggests that respect for property rights is an important element in the implementation of Article 1, even if specific standards in these national systems differ. The conditions for interference with property rights have also been considered in observations by the CESCR and HRC. The most systematic requirement has been for property rights to be addressed in a legal framework, with effective enforcement through courts.<sup>156</sup> Public purpose as a basis for expropriation has sometimes been raised.<sup>157</sup> A significant trend is the growing support from both the CESCR and HRC behind the standard of ‘adequate’ compensation,<sup>158</sup> which would be in line with regional bodies. This corresponds with CESCR General Comment No. 7, on forced evictions, which supports adequate compensation as an effective remedy for deprivation of property.<sup>159</sup> Elaborating on the concept, the CESCR has specified that compensation “should be commensurate with the actual value of the land”,<sup>160</sup> though this could allow for other factors to affect a valuation. The committees have also recognised other forms

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<sup>154</sup> Angola, Fourth and Fifth Periodic Reports 2014, UN Doc. E/C.12/AGO/4-5, para. 18.

<sup>155</sup> Liberia, Initial Report 2016, UN Doc. CCPR/C/LBR/1, paras. 7-11.

<sup>156</sup> CESCR Concluding Observations on Columbia, 6 October 2017, UN Doc. E/C.12/COL/CO/6, paras. 17-18.

<sup>157</sup> CESCR Concluding Observations on Sudan, 9 October 2015, UN Doc. E/C.12/SDN/CO/2, para. 12.

<sup>158</sup> CESCR Concluding Observations on Niger, 29 March 2018, UN Doc. E/C.12/NER/CO/1, para. 18; CESCR Concluding Observations on Russia, 6 October 2017, UN Doc. E/C.12/RUS/CO/6, para. 15; CESCR Concluding Observations on Angola, 24 June 2016, UN Doc. E/C.12/AGO/CO/4-5, para. 20; CESCR Concluding Observations on Thailand, 19 June 2015, UN Doc. E/C.12/THA/CO/1-2, para. 10; Concluding Observations on Finland, 28 November 2014, UN Doc. E/C.12/FIN/CO/6, para. 9; CESCR Concluding Observations on Nepal, 28 November 2014, UN Doc. E/C.12/NPL/CO/3, para. 9; CESCR Concluding Observations on Indonesia, 23 May 2014, UN Doc. E/C.12/IDN/CO/1, para. 38. HRC Concluding Observations on Liberia, 23 July 2018, UN Doc. CCPR/C/LBR/CO/1 para. 47.

<sup>159</sup> CESCR General Comment No. 7, *supra* note 35, para. 13.

<sup>160</sup> CESCR Concluding Observations on Niger, 29 March 2018, UN Doc. E/C.12/NER/CO/1, para. 18.



of compensation, including the provision of alternative land<sup>161</sup> and benefit-sharing for a community.<sup>162</sup>

### **5.3 Subsistence Farmers and Traditional Land Rights**

Subsistence farmers and people with land rights rooted in traditional custom form part of a state's people with particular vulnerability over their means of subsistence.<sup>163</sup> This wider protection of subsistence under Article 1(2) can be seen in the CESCR's General Comment No. 15, which addressed access to water for both subsistence farmers and indigenous peoples under Article 1(2).<sup>164</sup> The position of subsistence farmers and traditional property owners has been raised both by the CESCR and states parties in their reports under Article 1. For example, the CESCR in its Concluding Observations on Sudan in 2015 raised the impact of development projects on small-scale farmers and agropastoralists and urged legal recognition of their customary tenure.<sup>165</sup> Similarly, in states' reports, Côte d'Ivoire in its 2013 report to the HRC addressed allocation of title to customary land owners,<sup>166</sup> while Cambodia in 2012 referred to its programme to confer title to persons possessing land without documentation.<sup>167</sup> Burkina Faso in its 2015 report raised its law on rural land tenure, which it noted applied to "nomadic

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<sup>161</sup> HRC Concluding Observations on Liberia, 23 July 2018, UN Doc. CCPR/C/LBR/CO/1 para. 47.

<sup>162</sup> CESCR General Comment No. 24, 10 August 2017, UN Doc. E/C.12/GC/24, para. 17; HRC Concluding Observations on Liberia, 23 July 2018, UN Doc. CCPR/C/LBR/CO/1 para. 47.

<sup>163</sup> Final Study of the Human Rights Council Advisory Committee on the Advancement of the Rights of Peasants and Other People Working in Rural Areas, UN Doc. A/HRC/19/75, 24 February 2012, 4-8.

<sup>164</sup> CESCR General Comment No. 15, *supra* note 62, para. 7.

<sup>165</sup> CESCR Concluding Observations on Sudan, 9 October 2015, UN Doc. E/C.12/SDN/CO/2, para. 11. *See also* CESCR Concluding Observations on Uganda, 19 June 2015, UN Doc. E/C.12/UGA/CO/1, paras. 12 and 14; CESCR Concluding Observations on Niger, 29 March 2018, UN Doc. E/C.12/NER/CO/1, para. 17.

<sup>166</sup> Côte d'Ivoire, Initial Report 2013, UN Doc. CCPR/C/CIV/1, paras. 43-44.

<sup>167</sup> Cambodia, Second Periodic Report 2012, UN Doc. CCPR/C/KHM/2, para. 32.



shepherd” communities, such as the Fulani and Tuareg, though it denied they were indigenous peoples, “strictly speaking”.<sup>168</sup>

The CESCR has also referred under Article 1 to recognition of customary land tenure of peasants and smallholders in the non-binding FAO Voluntary Guidelines on Responsible Governance of Tenure 2012.<sup>169</sup> Similar recognition is expressed in the draft UN Declaration on the Rights of Peasants,<sup>170</sup> which calls on states to “take appropriate measures to provide legal recognition for land tenure rights, including customary tenure rights, not currently protected by law.”<sup>171</sup> This declaration also calls for consultations where natural resources traditionally held or used by peasants are interfered with,<sup>172</sup> though this does not require free, prior and informed consent.<sup>173</sup> In addition, it prohibits arbitrary deprivation of land and access to resources.<sup>174</sup> However, its commentary notes that while this protects persons with recognised title, it does not necessarily help forms of traditional property that differ from an individual property model.<sup>175</sup> Nonetheless, communities with similar vulnerabilities to indigenous peoples can be considered under Article 1 and this corresponds with wider recognition of traditional property.<sup>176</sup>

## 5.4 Minorities

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<sup>168</sup> Burkina Faso, Initial Report 2015, UN Doc. E/C.12/BFA/1, para. 43.

<sup>169</sup> FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security 2012, <<http://www.fao.org/docrep/016/i2801e/i2801e.pdf>>, visited 22 September 2018. CESCR Concluding Observations on Uganda, 19 June 2015, UN Doc. E/C.12/UGA/CO/1, para. 12.

<sup>170</sup> See M. Barelli, *Seeking Justice in International Law* (Routledge, London, 2016) pp. 87-89.

<sup>171</sup> Article 17(3), draft Declaration.

<sup>172</sup> See Articles 5(2) and 2(3), draft Declaration.

<sup>173</sup> Report of the Open-Ended Intergovernmental Working Group on a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, 13 July 2018, A/HRC/39/67, para. 54.

<sup>174</sup> Article 17(4), draft Declaration.

<sup>175</sup> Working Group, *supra* note 173, pp. 57-58.

<sup>176</sup> W. Wicomb and H. Smith, ‘Customary Communities as “Peoples” and their Customary Tenure as “Culture”’: What we can do with the Endorois Decision”, 11 *Afr. Hum. Rights Law J.* (2011) pp. 422-446.

Ethnic, religious and linguistic minorities are another section of a state's people with particular vulnerabilities. As the boundaries of indigeneity vary between regions<sup>177</sup> and are contested by states, other populations can have similar characteristics to indigenous peoples. The Inter-American Court, in particular, developed communal property rights based on Article 1 for the Saramaka, Kalina and Lokono as 'tribal', rather than indigenous peoples. Tribal peoples had "similar social, cultural, and economic characteristics" to indigenous peoples and this creates an even greater overlap with minorities.<sup>178</sup> Minorities could rely on subsistence agriculture for a livelihood; have a tradition of customary land ownership; have a close connection between land and culture; and experience marginalisation. For example, the CESCR in its Concluding Observations on Thailand in 2015 expressed concern about enjoyment of "traditional individual and communal rights by ethnic minorities in their ancestral lands" under Article 1, without characterising them as 'indigenous'.<sup>179</sup>

Another vulnerability of minorities could come from their relationship with an ethnic majority government or from ethnic conflict within a state, which often centres on the distribution of land and resources. The CESCR in its 2015 observations on Iraq addressed the land rights of the Assyrian minority under Article 1. This specifically related to the conflict in north of the country, which involved competing claims between different ethnic and religious groups over land. In this case, the Kurdish regional government had expropriated Assyrian property, which

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<sup>177</sup> See Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005) 91-93.

<sup>178</sup> *Saramaka*, *supra* note 65, para. 93.

<sup>179</sup> CESCR Concluding Observations on Thailand, 19 June 2015, UN Doc. E/C.12/THACO/1-2, para. 10.

included both individual and communal ownership,<sup>180</sup> and failed to implement court rulings on its return.<sup>181</sup>

It must be noted, though, that this examination of minorities under Article 1 has been relatively rare. The association of minorities with Article 1 has been controversial as it carries connotations of secession or at least economic balkanisation within a state and despite their overlap with indigenous peoples, minorities have not received the same level of attention. Nonetheless, they can still be seen as a vulnerable section of a state's people.

## 6. Conclusion

This article has looked at how property rights have defined the peoples' right to dispose of resources and protection of their means of subsistence under Article 1(2) of the Covenants. It has shown how the peoples' right to resources can draw from concepts of property, whether individual, communal or public. Article 1(2) has developed through a pairing of a peoples' right to dispose of resources and the protection of their means of subsistence. Property rights feed into the right to resources, with the protection of subsistence not only defining this connection but also addressing the effects of the failure to respect those rights on food, water, housing, livelihood and culture.

A major focus in the development of a right to resources has been on indigenous peoples but it is also clear that other vulnerable communities and sections of a population also fall within the scope of Article 1. The common feature of 'peoples' addressed under the Article is that they

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<sup>180</sup> 'Iraqi Kurdistan: Christian Demonstration Blocked' Human Rights Watch, 22 April 2016, <<https://www.hrw.org/news/2016/04/22/iraqi-kurdistan-christian-demonstration-blocked>>, visited 27 July 2018; The Status of Christians in the Kurdistan Region in Iraq: A Short Report by the Kurdistan Regional Government UK Representation, December 2009, <[http://cabinet.gov.krd/uploads/documents/Status\\_Christians\\_Kurdistan\\_Region\\_Dec\\_09\\_2009\\_12\\_22\\_h16m26s16.pdf](http://cabinet.gov.krd/uploads/documents/Status_Christians_Kurdistan_Region_Dec_09_2009_12_22_h16m26s16.pdf)>, visited 27 July 2018.

<sup>181</sup> CESCR Concluding Observations on Iraq, 9 October 2015, UN Doc. E/C.12/IRQ/CO/4, paras. 13-14.

are states' peoples or sections of that people with vulnerabilities over subsistence. This is also true for indigenous peoples whose rights still fall within the framework of state sovereignty.<sup>182</sup> The vulnerability of indigenous peoples over their subsistence and access to land and resources is shared by small-scale farmers, pastoralists and traditional land users, ethnic minorities and women. These vulnerabilities over subsistence and property rights are not restricted to any particular group, even if the main focus of reporting is likely to continue to be on indigenous peoples.

If a right of peoples to dispose of resources and protection of their subsistence is to be more than just rhetorical its needs to be attached to specific standards. Subsistence could provide a focus for individual property violations to be considered a breach of Article 1(2), in contexts such as land-grabbing<sup>183</sup> and forced evictions,<sup>184</sup> which have been raised by the CESCR under Article 1. Standards over the deprivation of property are still developing in the practice of the committees. Accordance with law would correspond with the prohibition of arbitrary deprivation, but increasing practice from the CESCR and HRC behind 'adequate compensation' is a significant trend. The practice behind this form of compensation is still not extensive and the contours of 'adequate' have not been refined, but it would bring the Covenants in line with regional human rights instruments. Protection of subsistence appears to inject proportionality into restrictions on property rights, but this principle raised in *Poma Poma* needs further exploration in observations and communications. Consultation is also an element. The role of consent in this process has varied in an indigenous context and is weaker outside it, though standards may vary in relation to subsistence. Nonetheless, this relationship still needs further clarification.

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<sup>182</sup> See Articles 3, 4 and 46(1), Declaration on the Rights of Indigenous Peoples, annexed to General Assembly Resolution 61/295, 13 September 2007, UN Doc. A/RES/61/295.

<sup>183</sup> See, e.g., CESCR Concluding Observations on Indonesia, 23 May 2014, E/C.12/IDN/CO/1, para. 29.

<sup>184</sup> CESCR Concluding Observations on Iraq, 9 October 2015, UN Doc E/C.12/IRQ/CO/4, para. 14.

Ultimately, the peoples' right to resources and protection of subsistence in Article 1(2) can provide security to vulnerable sections of a state's people and underpin the protection of other rights in the Covenants. An interpretation of Article 1(2) tied to subsistence is one of minimum guarantees rather than wider rights. Nevertheless, as the HRC has shown with its caution over Article 1, the right to resources could be most effective, where it is limited to tangible effects on groups of individuals, rather than being drawn into difficult questions about the structure of states.